No. 14,996

In the

United States Court of Appeals

For the Ninth Circuit

HAROLD L. WARD, et al.,
Appellants,

vs.

UNION BOND & TRUST COMPANY, a Corporation,
Appellee.

Appellants' Petition for a Rehearing

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"But where, as here, the vendor would have received greater benefit if the property had remained in his hands than the amount obtained by him because of the forfeiture, there is no inequity."

Bird v. Kenworthy, 43 Cal. 2d 656, 660, 277 P.2d 1.

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Appellants respectfully petition for a rehearing.

GROUNDS FOR A REHEARING

The court misunderstood, misconstrued and misapplied the law of California in the following crucial respects:

(1) The court completely ignored the California rule that relief by way of reinstatement cannot be given a wilfully defaulting vendee. In fact, the opinion does not even mention *Crofoot v. Weger,* 109 Cal. App. 2d 839, 241 P.2d 1017, the leading case on that point.

(2) The court completely ignored the California rule that no relief can be given a defaulting vendee unless the termination of the contract is shown to have resulted in a

forfeiture. In fact, the opinion does not even mention *Bird v. Kenworthy,* 43 Cal. 2d 656, 277 P.2d 1, the leading case on that point.

ARGUMENT

In effect, the court holds that, under the law of California, a defaulting vendee is entitled to reinstatement of the contract under any and all circumstances (regardless of whether his default was wilful and regardless of whether the termination of the contract resulted in a forfeiture).

To reach that decision, the court relies upon what it describes as firmly established principles of American jurisprudence and inherent powers of a court of chancery as well as upon inferences which it draws from three California cases (*Freedman v. The Rector,* 37 Cal. 2d 16, 230 P.2d 269, *Petersen v. Ridenour,* 135 Cal. App. 2d 720, 287 P.2d 848, and *Weil v. Barthel* (Cal.) 279 P.2d 544).

What is significant, however, is that it completely ignores three cases which are in point: *Crofoot v. Weger,* supra, *Bird v. Kenworthy,* supra, and its own decision (authored by Judge Stephens) in *Wuchner v. Goggin,* 175 F.2d 261.

What we are concerned with in this case is not a principle of American jurisprudence or an inherent power of a court of chancery. We are concerned with rules of California law, rules which this court must follow even though it considers them unsound (*West v. American Telep. & Teleg. Co.,* 311 U.S. 223, 236-237, 85 L. ed. 139), rules which give this court no choice but to reverse the judgment.

(1) The Court Completely Ignores Crofoot v. Weger and the Rule Which That Case Announces.

As we have from the beginning, we recognize that relief may be given a defaulting vendee outside of the provisions of section 3275 of the Civil Code. This does not mean, how-

ever, that all of the relief which is available to a nonwilfully defaulting vendee under that section is available to a wilfully defaulting vendee independently of that section. On the contrary, section 3275 expresses a legislative intent that a wilfully defaulting vendee should *not* be entitled to all of the relief to which a nonwilfully defaulting vendee may be entitled.

That such is the law was made clear in *Crofoot v. Weger,* supra, the one California case which considered the question of the relief available to a defaulting vendee in the way in which that question was raised in this case.*

Yet this court does not even mention that case in its opinion.

In *Crofoot v. Weger,* supra, the court expressly instructed the trial court to determine whether the default was wilful or not and to reinstate the contract only if the default was found not to have been wilful.

At page 842 of 109 Cal. App. 2d, the court stated:

> "Likewise the trial court could have found that the loss suffered by the appellants when the respondents terminated the contract was a forfeiture or a loss in the nature of a forfeiture, and such findings, coupled with findings that the breach was neither wilful nor the product of gross negligence would have made proper a reinstatement of the contract upon equitable conditions, if that were still possible, and if not then the recovery by the appellants of such amounts of the payments made as lay within the area of forfeiture.
>
> "In addition to the foregoing, if the court had found that the breach was wilful or grossly negligent so as to prevent equitable relief under section 3275 of the Civil Code there was still the duty of the court to go

*It was also made clear by the earlier case of *Barkis v. Scott,* 34 Cal. 2d 116, 208 P.2d 367, in which the court found it necessary to reverse the finding that the defaults were wilful in order to grant the vendee relief by way of reinstatement of the contract.

further and find whether or not the termination of the contract by the respondents for the appellants' default resulted in the unjust enrichment of the respondents. If such were the result then it would have been the duty of the court to give judgment for so much of the funds paid in as constituted unjust enrichment."

The *Crofoot* case is in point. It is a square holding on the subject, one that is subsequent to the decision in *Freedman v. The Rector*, supra (in fact, it is the last decision on that particular point), and one that is binding upon this court.

And if this court believes that it is not bound thereby, the parties to this action are at least entitled to be told why.

(2) The Court Completely Ignores Bird v. Kenworthy and the Rule Which That Case Announces.

This court similarly ignores *Bird v. Kenworthy,* supra, the leading California case holding that there can be no penalty or forfeiture so long as the vendee received more than he paid for.

The trial court at least mentioned it in a footnote but this court does not even deem it necessary to go that far. It relies upon what it describes as "the very teaching of the doctrine of the Freedman case" but its decision is contrary to the very teaching of the doctrine of the Bird case.

In this case, the termination of the contract could have resulted in a penalty or forfeiture only if the value of the use of the land while Union was in possession and the value of the timber which it removed were less than the $585,000 which it paid (coupled with the value of its improvements to the land).

But there was no showing whatsoever (and, on that issue, the burden of proof was upon Union (*Baffa v. Johnson*, 35 Cal. 2d 36, 216 P.2d 13)), either as to the value of the use of the land while Union was in possession or as to the value of the more than 90 million feet of timber which it removed.

Hence, no forfeiture was shown from which Union was entitled to be relieved. This court simply *assumed* that there was one.

It should be noted that *Crofoot v. Weger,* supra, requires the trial court to *find* that there was a forfeiture before relief can be granted.

It should be noted too that this court altogether failed to pass upon, although it does mention, the last of our specifications of errors, namely, that no forfeiture could be found to have resulted from the termination of the contract in the absence of (1) a finding as to whether the amount paid by Union exceeded the damages sustained by Ward and (2) a finding as to the reasonable value of the use of the property during the eight years during which Union was in possession.

This court holds that the trial court was justified in giving Union relief by way of reinstatement of the contract because it had the inherent power to order a judicial sale of the property. What this court fails to note, however, is that a judicial sale could similarly have been ordered and that it was not ordered in the *Bird* case.

Instead, the vendor, who would have received only $29,000 had the vendee completed the contract, was allowed to retain a total of $52,000 as a result of the vendee's default.

He was obviously enriched yet the court held that he was not *unjustly* enriched.

It must be emphasized that the *Bird* case *was* a case in which the vendee sought to be relieved from a forfeiture. It *was* a case in which the vendee invoked the equitable powers of the court and in which, after citing a number of other equity cases, the court held that he was not entitled to any equitable relief.

Under the terms of the contract, the vendor, in *Bird v. Kenworthy,* supra, was entitled only to another $5,000. He

was also entitled to recover such damages as he had suffered as a result of the vendee's default. Had the property been sold, he would have received those damages as well as the amount due him under the contract (in other words, he would have received the benefit of his contract) and the balance would have been refunded to the vendee.

Instead of ordering a judicial sale, however, the court allowed the vendor to retain the property (worth $28,000) without making any restitution to the vendee.

How can be it be said in the light of that case that, since it could have ordered a judicial sale of the property in this case, the trial court was justified in reinstating the contract?

(3) The Cases Relied Upon by This Court Are Altogether Distinguishable.

The opinion relies upon what it describes as the teaching of the doctrine of the *Freedman* case (even though it recognizes that the facts in that case were entirely dissimilar).

It is true that, in that case, the parties were made whole by allowing a restitution. The point is, however, that *they were made whole as if there had been no contract not as if the contract had been performed.*

Although the benefit of his bargain (the increase in the value of the real property) could not be given the vendee by way of specific performance (since the property had been sold), it could still have been given him by way of damages. This, the Supreme Court of California, expressly refused to do.

The case of *Petersen v. Ridenour*, supra, is similarly distinguishable since, as was pointed out in our reply brief, it involved nonwilful defaults and, in any event, was decided on the basis of a waiver of those defaults by the vendor.

As we also pointed out in our reply brief, the superseded opinion of the Supreme Court of California in *Weil v. Bar-*

thel, supra, merely held that a decree in a previous action was a decree of foreclosure by sale rather than a decree of strict foreclosure and that, under an applicable California statute, the vendee was entitled to a period of redemption. We do not believe that the case can be relied upon as a "useful guide" to anything but, in any event, it is certainly not a guide to what the trial court and this court have done in this case.

CONCLUSION

Despite the absence of any evidence on the subject, this court unequivocally states that Union's equity in the property far outweighs the equity of Ward. It also states that the relief sought by Ward was nothing short of a strict cancellation and forfeiture of the contract and of Union's equity in the property.

Although we have never conceded and do not now concede that Union's equity now outweighs that of Ward (it must be remembered that Union removed over 90 million feet of logs on which it made a huge profit), we have at all times conceded that Union may be entitled to some relief by way of restitution.

We thought that we had made our position clear on that subject but the opinion in no way recognizes that such is our position and in fact makes it appear that, according to us, the only choice open to the trial court was either to deny Union all relief or to give it all of the relief for which it prayed and allow it to complete the contract.

Such was not the only choice open to the trial court or to this court. The crucial contention which we raised and which this court by-passes was that, even if Union was entitled to relief, the only relief which the trial court had the power to give it was relief against Ward's unjust enrichment by way of restitution of part of its payments.

Thus, a rehearing must be granted not only because the opinion of this court is in flat conflict with the decision in *Crofoot v. Weger,* supra, as well as with the very teaching of the doctrine of *Bird v. Kenworthy,* supra, but also because it fails to pass upon one of the crucial issues raised by appellants.

In fact, the questions presented by this case appear to us to be of sufficient importance to justify our suggesting, in accordance with Rule 23, that the case be reheard *en banc.*

Respectfully submitted,

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Certificate of Counsel

I hereby certify that I am of counsel for appellants and petitioners in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
May 16, 1957.

CYRIL VIADRO,
Of Counsel for Appellants and Petitioners.